

ACT OF SEARCHING SUSPECTED SHOPLIFTER HELD SLANDEROUS

Bennett v. Norban

396 Pa. 94, 151 A.2d 476 (1959)

After leaving defendant's self-service store, plaintiff was overtaken near the entrance by the store's assistant manager who, erroneously suspecting her of shoplifting, physically blocked her path and angrily ordered her to remove her coat. He searched it, her purse, and the pockets of her dress; and, finding nothing, returned to the store. Passers-by had gathered to watch this incident to plaintiff's great distress and humiliation. Reversing the lower court's order sustaining objections to the counts of slander and invasion of privacy, the Pennsylvania Supreme Court held that defendant should answer on both counts.¹

Ordinarily, slander is defined as the *spoken* publication of defamatory matter.² The inherent unjustness of this definition is its exclusion of acts and gestures which, unaccompanied by any defamatory words, nevertheless convey a defamatory meaning. However, this delusive definition is likely to persist as long as there is such a dearth of authority on this subject.³

Had the implication of the assistant manager's conduct in the instant case⁴ been verbally expressed, it would have constituted slander per se according to the law of most states, including Ohio.⁵ The term slander per se designates those defamatory charges which, because of their serious nature, are presumed by law to cause injury, thus obviating the necessity of proving actual damage.⁶

The prevention of defamation and the remedying of injuries, caused by

¹ The existence of the *right* of privacy has been recognized only recently in Ohio. *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956). This case has been noted in 17 Ohio St. L.J. 346 (1956). Also see 22 Ga. B.J. 247 (1959) for a casenote on the invasion of privacy count of the instant case. See generally 77 C.J.S. "Right of Privacy" § 1 *et seq.* (1952); 41 Am. Jur. "Privacy" § 1 *et seq.* (1942); 32 Ohio Jur. "Privacy" § 1 *et seq.* (1934).

² See *e.g.*, 33 Am. Jur. "Libel and Slander" § 55 (1941); 53 C.J.S. "Libel and Slander" § 1 (1948); 34 Ohio Jur. 2d "Libel and Slander" § 2 (1958); 39 Words and Phrases 486 (1953).

³ Even the instant case failed to cite any case authority that has held defamatory acts or gestures slanderous.

⁴ The court stated that the entire incident suffered by the plaintiff was "... a dramatic pantomime suggesting to the assembled crowd that appellant was a thief." *Bennett v. Norban*, 396 Pa. 94, 98, 151 A.2d 476, 478 (1959).

⁵ *Simpson v. Pitman*, 13 Ohio 365 (1844); *Haines v. Welling*, 7 Ohio 253 (1835); *Cheadle v. Buell*, 6 Ohio 67 (1833); *Seaton v. Cordray*, Wright 101 (Ohio 1832); *Hughey v. Bradrick*, 39 Ohio App. 486, 177 N.E. 911 (1931); *Reinhardt v. Faschnacht*, 4 Ohio C.C.R. 321, 2 Ohio C.C. Dec. 571 (Ct. App. 1890); *Tedtman v. Hancock*, 1 Ohio C.C.R. 238, 1 Ohio C.C. Dec. 129 (Ct. App. 1885). See *e.g.*, 53 C.J.S. "Libel and Slander" § 70 (1948); 33 Am. Jur. "Libel and Slander" § 31 (1941).

⁶ See *e.g.*, 53 C.J.S. "Libel and Slander" § 8 (1948).

the publication of false and defamatory matter; to one's pecuniary interests,⁷ to one's freedom of social intercourse,⁸ and to one's reputation⁹ are all avowed purposes of a defamation action. But these rights may be violated by acts as well as by words; so, unless there is some compelling reason for tolerating such injuries when caused by acts, they should be actionable. Perhaps the inherent difficulty in ascertaining the meaning of acts justifies such toleration. This difficulty could lead to the misinterpretation of innocent acts with a consequent undue restriction on our freedom of action. However, this danger is very slight since the court would determine, as in the case of words,¹⁰ if the acts convey a meaning so unambiguous as to be actionable *per se* or *per quod*; or whether they are susceptible of a sufficient defamatory meaning to present a jury question. Acts may convey precisely the same defamatory meaning as words, and where the acts clearly convey a charge of larceny, as in the instant case, they should be held slanderous *per se*.

There is both United States¹¹ and foreign¹² secondary authority for following the ancient Roman¹³ and English¹⁴ rule that defamatory acts, unaccompanied by any defamatory words, are actionable. For instance,

⁷ *G. M. McKelvey Co. v. Nanson*, 5 Ohio App. 73, 24 Ohio C.C.R. (n.s.) 314 (Ct. App. 1915).

⁸ *Kaucher v. Blinn*, 29 Ohio St. 62 (1875); *Beatty v. Baston*, 13 Ohio L. Abs. 481 (Ct. App. 1932); *McKean v. Folden*, 2 Ohio Dec. Reprint 248 (C.P. 1859) (dictum).

⁹ *Alfele v. Wright*, 17 Ohio St. 238 (1867); *Malone v. Stewart*, 15 Ohio 319 (1846); *Simpson v. Pitman*, *supra* note 5; *Haines v. Welling*, *supra* note 5; *Cheadle v. Buell*, *supra* note 5; *Rollins v. Pennock*, 2 Ohio Dec. Reprint 735 (C.P. 1862); *Motley v. Gombos*, 78 Ohio L. Abs. 546, 153 N.E.2d 465 (C.P. 1958).

¹⁰ *Becker v. Toulmin*, 165 Ohio St. 549, 138 N.E.2d 391 (1956).

¹¹ Restatement, Torts, § 568 (1938). "Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those stated in subsection (1).", which defined libel.

¹² See *Schultz v. Frankfort Marine Accident and Plate Glass Ins. Co.*, 151 Wis. 537, 139 N.W. 386 (1913); *Svendsen v. State Bank of Duluth*, 64 Minn. 40, 65 N.W. 1086 (1896). But see *Collins v. Oklahoma State Hospital*, 76 Okla. 229, 184 Pac. 946 (1916), where the acts of certain hospital employees in placing a white patient in the part of the institution set apart and used for colored patients was held not to be libelous even though it would have been libelous *per se* to have written that a white person was colored. However, the result of this case seems to have been due to the court's use of the *ejusdem generis* rule in strictly construing the Oklahoma statute defining libel. 5 Cornell L.Q. 340 (1920).

¹³ Newell, Slander and Libel 12 *et seq.* (3d ed. 1914). The following are three examples of defamatory acts in the Roman law as listed by Newell: 1. Forcing your way into the house of another. 2. Persistently following a matron, or a young girl respectably dressed, as being an imputation of unchastity. 3. Needlessly fleeing to the emperor's statue for refuge, making it appear that someone was oppressing you.

¹⁴ See *De Libellis Famosis*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (1606); *Rex v. Roberts*, 3 Keb (Eng.) 378 (1675); *Austin v. Culpepper*, 2 Show K.B. 313 (1674); *Mason v. Jennings*, T. Raymond (Eng.) 401 (1680); *Plunket v. Gilmore*, Fortescue (Eng.) 211 (1725); *Jefferies v. Duncombe*, 11 East (Eng.) 226 (1809); *Eyre v. Garlick*, 42 J.P. 68 (1878).

the act of a banker in returning a merchant's check through a clearing house to the holder when the merchant had sufficient funds in the bank to pay the check has been held slanderous *per se*.¹⁵ Also, the continuous open or rough shadowing of a person by two private detectives so as to publicly proclaim him a suspect has been held a libel.¹⁶

Ohio has been mute on whether defamatory acts are actionable;¹⁷ but assuming they are, the Ohio shopkeeper may be able to avoid personal liability for such acts in certain situations. The Ohio temporary detention of suspected shoplifters statute¹⁸ permits a merchant who *reasonably suspects* one of shoplifting to detain such a person in a *reasonable manner* for a *reasonable time* in order to obtain a warrant for such person's arrest. In the present case, however, the assistant manager searched the plaintiff against her will in the presence of third parties rather than merely detaining her in a reasonable manner. His conduct would not be within the purview of the Ohio statute.

In summary, defamatory acts should be actionable because the rights protected by a defamation action may be violated by acts as well as by words. Foreign precedent supports holding them actionable. The only contra argument—the danger of misinterpreting the meaning of acts—is unconvincing because of the court's control over the jury. Therefore, a distinction should not be made between acts and words which convey a similar defamatory meaning.

Arthur R. Pulskamp

¹⁵ Svendsen v. State Bank of Duluth, *supra* note 12.

¹⁶ Schultz v. Frankfort Marine Accident and Plate Glass Ins. Co., *supra* note 12. *But see* Molt v. Public Indemnity Co., 10 N.J. Misc. 879, 161 Atl. 346 (Super. Ct. 1932) where the judge in referring to the Schultz case, *supra*, said that he thought it was a case of continuous slander rather than libel.

¹⁷ *But cf.* Lakin v. Gun, Wright 14 (Ohio 1831). Although acts, rather than words, were involved in this case, it cannot be said that defamatory acts were held non-actionable as such, because the opinion's Aesopian language supports conflicting reasons for the Ohio Supreme Court's sustaining of the defendant's demurrer.

¹⁸ Ohio Rev. Code § 2935.041 (1957).